MOGAN MARUTHAMUTHU

v.

PP

HIGH COURT MALAYA, TAIPING
VT SINGHAM JC
[CRIMINAL APPEAL NO: 42-07-2001]
15 APRIL 2002

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Ten years imprisonment and ten strokes of rotan - Possession of cannabis - Whether excessive - Whether trial judge applied correct principles of sentencing - Dangerous Drugs Act 1952, ss. 6, 39A(2)*

CRIMINAL PROCEDURE: *Sentence - Previous convictions - Order of Juvenile Court - Whether order was a previous conviction - Juvenile Courts Act 1947, s. 12(1)(f) - Registration of Criminals and Undesirable Persons Act 1969, s. 2*

CRIMINAL PROCEDURE: *Sentence - Previous convictions - Gap principle - Time gap between previous and present offences - Whether ought to be construed in favour of accused*

This was an appeal by the accused against the decision of the learned sessions court judge ('SCJ') sentencing him to ten years imprisonment and ten strokes of the rotan for pleading guilty to a charge of being in possession of dangerous drugs, namely cannabis, which was an offence under s. 6 of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39A(2) of the same. The learned deputy public prosecutor contended that the sentence was in accordance with s. 39A(2) of the Act and should be maintained as the accused had two previous convictions which were: (1) an order of the Juvenile Court given on 24 January 1983 ('the said order') that the accused be sent to the Henry Gurney School until he reached 21 years of age under s. 12(1)(f) of the Juvenile Courts Act 1947 ('JCA') for an offence under s. 324 of the Penal Code; and (2) a sentence by the Magistrates Court, Taiping, to six months imprisonment on 29 November 1986 for possession of ganja, an offence under s. 6 of the Act.

Held:

[1] The said order against the accused was neither a "registrable offence" nor covered by "registrable particulars" under the definition provided in s. 2 of the Registration of Criminals and Undesirable Persons Act 1969 as the accused was not convicted or sentenced by the Juvenile Court in accordance

with the spirit of the Juvenile Court and in the light of the objectives of the legislation which enacted the JCA. Consequently, the learned SCJ, in assessing the appropriate sentence, had clearly erred when she took into consideration the said order as a previous conviction. (p 126 e-h)

[2] As to the gap between the previous conviction of the accused on 29 November 1986 for a drug-related offence under s. 6 of the Act and the present conviction which was also for a similar offence which the accused had committed on 17 March 2001, the learned SCJ ought to have considered the gap of 16 years in favour of the accused in arriving at a proper assessment of the sentence, instead of an aggravating factor against the accused to justify imposing a deterrent sentence. Furthermore, the learned SCJ had taken into account unauthorised, irrelevant and gravely prejudicial matters which were not even before the court in assessing the appropriate sentence and which no doubt had caused grave injustice to the accused and to the administration of justice itself. (pp 130 b-c & 131 e-f)

[3] In the circumstances and taking into account the cumulative effect of the serious misdirections in law by the learned SCJ, the several unsatisfactory features in the instant appeal and the grave injustice to the accused who was not represented by counsel, it could not be said that the learned SCJ had exercised her discretion judicially when imposing the sentence of ten years imprisonment. Accordingly, the appeal against sentence was allowed; the sentence of ten years imprisonment was reduced to seven and a half years and the ten strokes of the rotan was confirmed. (p 132 f-i)

[Ordered accordingly.]

Case(s) referred to:

Abdul Rahman Ibrahim v. The Public Prosecutor Of Johore [1938] 7 MLJ (JR) 219 ***(refd)***

Abu Bakar Alif v. R [1953] 19 MLJ 19 ***(refd)***

Govindarajoo v. Registrar of Criminals [1974] 1 MLJ 112 ***(foll)***

Habeeb Najar Abdul Rashid lwn. Penguasa Komandan, Pusat Serenti Bukit Mertajam, (Criminal Application No: 44-12-69 (unreported)) ***(refd)***

Hari Ram Seghal v. PP [1981] 1 MLJ 165 ***(refd)***

Kharudin v. PP [1969] 1 MLJ 45 ***(foll)***

Lee Yew Siong v. PP [1973] 1 MLJ 37 ***(refd)***

Leong Ka Kong v. PP [1976] 2 MLJ 21 ***(refd)***

PP v. Jafa Daud [1981] 1 MLJ 315 ***(refd)***

PP v. Khairuddin [1982] 1 MLJ 331 ***(refd)***

PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***

PP v. Mohamed Nor & Ors [1985] 2 MLJ 200 ***(refd)***

PP v. Wong Chak Heng [1985] 1 MLJ 457 ***(refd)***

R v. Ball 35 Cr App R 164 ***(refd)***

R v. Davies [1978] 67 Cr App R 207 ***(refd)***
Re Vir Singh [1998] (SSLR) Supp 6 ***(refd)***
Rex v. Leo De Cruz [1935] MLJ 1 ***(refd)***
Rex v. Teo Cheng Lian, Rex v. Leck Kwee Ser [1949] 15 MLJ 170 ***(refd)***
Rex v. Sussex Justices, ex p McCarthy ***(refd)***
Sia Yik Hung v. PP [1997] 4 CLJ (Supp) 503 ***(refd)***
Soosainathan v. PP [2001] 6 CLJ 44 ***(foll)***
Sures Perumal v. PP [2001] 2 CLJ 88 ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 39A(2)
Federal Constitution, s. 16(1)(a)
Juvenile Court Act 1947, 12(1)(d), (f)
Juvenile Courts Ordinance 1947, s. 12(3)
Penal Code, ss. 324, 379
Registration of Criminals And Undesirable Persons Act 1969, ss. 2, 4(1)(a), (b), 1st sch, part 1

For the appellant - In person
For the respondent - Abdul Hakim Amir Ahmad Nordin, DPP

Reported by Suresh Nathan

JUDGMENT

VT Singham JC:

This is an appeal by the accused against the sentence which was passed against him by the Sessions Court judge, Taiping on 27 August 2001 where he pleaded guilty to a charge of being in possession of dangerous drugs, namely 197.89 grammes of cannabis, which is an offence under s. 6 of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39A(2) of the same. He was sentences to ten years imprisonment from the date of his arrest being 17 March 2001 and ordered to be given ten strokes of the rotan. The accused was dissatified with the sentence and filed an appeal to the High Court through the Prison Authorities since he was not represented by counsel. Hence, this appeal.

Charge

The charge against the accused is as follows:

> Bahawa kamu pada 17/3/2001 jam lebih kurang 1.00 petang di kawasan Hutan Perkuboran Cina Kampong Aman, Pokok Assam, Taiping dalam daerah Larut Matang & Selama dalam Negeri Perak, bukan sebagai seorang yang diberi

kuasa atau disifatkan sebagai yang telah diberi kuasa di bawah Akta Dadah Berbahaya, 1952 atau peraturan yang telah dibuat di bawah Akta yang sama, telah didapati memiliki dadah jenis Cannabis sejumlah berat bersih 197.89 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah s. 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39A(2) Akta yang sama.

At The Sessions Court

On the plea of guilty by the accused, the learned Sessions Court judge proceeded to accept the facts of the case as presented by the prosecution and admitted by the accused. She found the accused guilty and convicted him of the charge after all the relevant exhibits were tendered and admitted by the accused. In mitigation, the accused appealed for a lenient sentence and requested for his sentence to start from the date of his arrest. He also informed the court that he has two children. He appealed to the Sessions Court judge to order the police to return the sum of RM450 which was taken from him by the police when he was arrested.

In reply, the prosecuting officer informed the Sessions Court judge that the accused has two, 'previous convictions', one was in 1983 and the other in 1986 and tendered the list of the previous convictions' which was admitted by the accused and marked as exh. P5.

The learned Sessions Court judge after taking into account the two 'previous convictions' sentenced the accused to ten years imprisonment effective from the date of his arrest on 17 March 2001 and ordered that he be given ten strokes of the rotan. The punishment provided under s. 39A(2) of the Dangerous Drugs Act 1952 against the person who is found guilty is imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes.

At The High Court

The appeal came up before this court on 18 October 2001. The accused was not represented by counsel. The accused appealed to this court to reduce his sentence to five years imprisonment and to maintain the ten strokes of the rotan. He said he has two children who were being looked after by his mother who is old and ill and that he is separated from his wife. He also informed this court that he regrets having committed the offence and that the sentence of imprisonment which he will have to undergo is itself a lesson to him. He appealed that a last chance be given to him. He also said that he is remorseful and promised that he will not be involved in any drug related offence or any other criminal activities in the future. He repeatedly appealed that a last chance be given to him.

The accused further appealed to this court to direct the police to return the cash, being the sum of RM450 which was taken from him by the police at the time when he was arrested. He said though he was informed by the police that the money will be returned to him the same as yet to be returned.

In reply, the learned deputy public prosecutor submitted that the learned Sessions Court judge had not erred in law when she imposed the sentence of ten years imprisonment against the accused. He submitted that the punishment provided under s. 39A(2) of the Dangerous Drugs Act 1952 is imprisonment for life or for a term which shall not be less than five years and shall be punished with whipping of not less than ten strokes and the Sessions Court judge had imposed only ten years imprisonment. He said the sentence is not excessive and that the accused has two 'previous convictions', namely, one for an offence under s. 324 of the Penal Code where he was ordered by the Juvenile Court, Taiping on 24 January 1983 to be sent to the Henry Gurney School until he reached the age of 21 years. As for the 2nd offence, the learned deputy public prosecutor informed this court that the accused was sentenced by the magistrate's court, Taiping to six months imprisonment on 29 November 1986 for possession of ganja, an offence under s. 6 of the Dangerous Drugs Act 1952 and the sentence is to commence from the date of his arrest on 7 October 1986. The learned deputy public prosecutor urged this court to maintain the sentence of ten years imprisonment as the sentence which was passed by the learned Sessions Court judge was in accordance with the law.

As for the accused's request to direct the police to return the sum of RM450, the learned deputy public prosecutor informed this court that he will investigate the matter and if it is found that the sum of RM450 was seized from the accused, he will direct the police to return the money. He said that since he did not have the investigation papers presently with him, he was not able to confirm if the money was infact seised by the police.

As to the list of the 'previous convictions', the learned deputy public prosecutor when questioned by this court as to whether the order by the Juvenile Court, Taiping pursuant to which the accused was ordered to be sent to the Henry Gurney School for an offence under s. 324 of the Penal Code was a "conviction" under the Juvenile Courts Act 1947 or a "registrable offence" or "registrable particulars" for the purpose of the Registration of Criminals And Undesirable Persons Act 1969 as the accused was then a juvenile, he changed his stand and replied that it was not a "conviction" and a registrable offence. To a further question by this court as to why that order by the Juvenile Court was included in the list of the 'previous convictions'. he replied that he was unable to give an answer as the list was tendered by the prosecuting officer in the lower court. To make matters worse, this court observed that the learned

Sessions Court judge in her grounds of judgment took into consideration the two 'previous convictions' as contained in the list and marked as exh. P5 when assessing the appropriate sentence against the accused. In fact, the learned Sessions Court judge had said in the grounds of judgment "OKT bukanlah pesalah pertama. Beliau mempunyai sabitan lalu sebelum ini. Sila rujuk pada P7 (list of previous conviction) yang mana telah diakui oleh beliau". To another question by this court as to whether the learned Sessions Court judge ought to have taken into account in favour of the accused the gap of 16 years from the time the accused was sentenced to six months imprisonment for possession of ganja on 29 November 1986 when compared to the offence in the instant appeal which the accused had committed on 17 March 2001, the learned deputy public prosecutor conceded that the Sessions Court judge ought to have taken this factor into consideration in favour of the accused namely, there was a gap of 16 years but he conceded that she had failed to do so in this case.

Notwithstanding that the previous offence and the conviction on 29 November 1986 was of a similar nature as the present conviction and bearing in mind the case of *PP v. Jafa Daud* [1981] 1 MLJ 315 at 316, this court is of the view that the gap principle could still be taken into account in favour of the accused when imposing sentence for the present offence.

This court is of the view that the learned Sessions Court judge had erred in law when she took into consideration as a 'previous conviction' the order of the Juvenile Court given on 24 January 1983 where the accused was ordered to be sent to the Henry Gurney School till the age of 21 years under s. 12(1)(f) of the Juvenile Courts Act 1947 for the offence under s. 324 of the Penal Code. The Order of the Juvenile Court should not have been considered as a 'previous conviction' by the learned Sessions Court judge in assessing the appropriate sentence as the Juvenile Courts Act 1947 expressly states that the words 'conviction' and 'sentence' should not be used in relation to juveniles dealt with by the Juvenile Court.

In *Kharudin v. PP* [1969] MLJ 45, the appellant pleaded guilty to a charge of stealing a bicycle under s. 379 of the Penal Code. The learned magistrate sentenced the appellant to one year imprisonment and imposed whipping of three strokes of the rotan after taking into account 13 previous convictions of the appellant of which five consisted of 'convictions' and 'sentences' passed by the Juvenile Court. In setting aside the punishment of whipping as ordered by the learned magistrate, His Lordship Syed Othman J (as he then was) said:

> The implications of this provision are very clear. As the words **"conviction"** and **"sentence"** cannot be used in relation to a child or a young person dealt with by the juvenile court, **the finding of guilt and an order made by that**

> **court**, which replace those words, **do not fall within the definition of "registrable particulars" for the purpose of the Registration of Criminals Ordinance, 1948**. I am therefore of the view that the Central Criminal Registry has not been acting within the requirements of this provision by keeping a record of "convictions" and "sentences" in respect of offences committed by the appellant when he was a child or young person. The Juvenile Court itself could not at law have convicted him or passed sentence on him for any offence. On this point I need only draw attention to the case of *Lim Soo Hak & Anor v. R* in which Spenser Wilkinson J held to the effect that a "conviction" by the Juvenile Court was irregular. **By keeping a record of "convictions" and "sentences" against such a person the Central Criminal Registry has defeated the very purpose for which the Juvenile Courts Ordinance, 1947**, was enacted, which in the main is to protect a juvenile offender from being dealt with like an ordinary criminal. The "convictions" and `sentences " recorded against appellant in respect of offences, dealt with by the Juvenile Court should therefore be expunged from the records of the Central Criminal Registry. (emphasis added)

For the purpose of convenience, it is useful to refer to s. 12(3) of the Juvenile Courts Ordinance 1947 which reads as follows:

> 12. Powers of a Juvenile Court on proof of offence.
>
> (3) The words "conviction" and "sentence" shall not be used in relation to juveniles dealt with by the Juvenile Court and any reference in any written law to a person convicted, a conviction and a sentence shall, in the case of a juvenile, be construed as a finding of guilt or an order made upon a finding of guilt, as the case may be.

In *Govindarajoo v. Registrar of Criminals* [1974] 1 MLJ 112, the juvenile was charged for an offence under s. 379 of the Penal Code. On 26 April 1969 the Juvenile Court found him guilty and he was bound over in the sum of $100 for one year under s. 12(1)(d) of the Juvenile Courts Act 1947 wherein his father, the applicant in that case executed the bond to exercise proper care and guardianship. At the hearing of another summons case in respect of a charge under s. 16(1)(a), Part III of the Second Schedule to the Federal Constitution, a certificate from the Registrar of Criminals containing the "conviction" and "sentence" of the said juvenile in the Juvenile Court as referred to previously was produced by the prosecution. The applicant who is the father of the juvenile requested for the return of the fingerprints, photographs and negatives of the juvenile from the Registrar of Criminals but it was refused on the ground that the particulars of the order made by the Juvenile Court were registrable particulars. As a result the juvenile's father, the applicant filed an originating motion at the High Court, Kuala Lumpur seeking *inter alia*

for an order of mandamus directing the Registrar of Criminals to deliver forthwith to the applicant the juvenile's fingerprint form, photographs and the negatives taken from the juvenile in respect of the offence at the Juvenile Court. His Lordship, Hashim Yeop A Sani (as he then was) held that as the juvenile could not be convicted in the Juvenile Court, the particulars of the juvenile as ordered by the Juvenile Court were not registrable under the Registration of Criminals Ordinance, 1948 which is now replaced by the Registration of Criminals And Undesirable Persons Act 1969. Accordingly, the Registrar of Criminals was ordered to return to the applicant the fingerprints form, photographs and negatives of the juvenile.

Following the view held in *Kharudin v. PP* [1969] 1 MLJ 45 which was followed in *Govindarajoo v. Registrar Of Criminals* [1974] 1 MLJ 112, where the Registration of Criminals Ordinance 1948 then applied, this court is of the same view that the Order of the Juvenile Court in the instant appeal which had ordered the accused to be sent to the Henry Gurney School until he reached the age of 21 years for an offence under s. 324 of the Penal Code is not a "conviction" under the Juvenile Courts Act 1947 and a 'registrable offence' under the First Schedule Part 1 of the Registration of Criminals And Undesirable Persons Act 1969. Further, the said Order of the Juvenile Court is also not covered by the "registrable particulars" under the said Act. Section 2 of the Registration of Criminals And Undesirable Persons Act 1969 defines "registrable particulars" to mean:

(a) the particulars of any conviction or sentence in respect of a registrable offence;

(b) the particulars of any order relating to banishees, expelees, deportees or restrictees;

(c) the name, description, photograph and finger impressions or classification of finger impressions of any person convicted of a registrable offence, or of any banishee, expelee, deportee or restrictee;

(d) the particular which the Minister deems to be a registrable particular under s. 4(1)(a);

(e) the particular which the Minister may from time to time by order published in the Gazette declare to be registrable particulars under s. (4)(1)(b); or

the particulars of any person which have been taken and recorded under any of the written laws repealed under this Act.

Section 4(1)(a) and (b) states as follows:

4(1) The Minister may from time to time to time by order published in the gazette:

(a) deem for the purposes of this Act particulars (forwarded to the Registrar) of person convicted of any offence (whether a registrable offence under this Act or otherwise) in or banished, expelled or deported from any country or part of a country outside the Federation to be registrable particulars; or

(b) declare for the purposes of this Act any particulars (other than the registrable particulars) described in paras (a) to (d) in the definition of "registrable particulars") to be registrable particulars.

(2) The order made under sub s. 1(a) may be general in respect of any particulars or offences or special in respect of any country or part of a country, or a particular individual, class of individual or any offence.

In the circumstances, this court is of the view that the said Order of the Juvenile Court against the accused is neither a "registrable offence" nor "registrable particulars" covered under the definition provided in s. 2 of the said Registration of Criminals And Undesirable Persons Act 1969 as the accused was not convicted or sentenced by the Juvenile Court in accordance with the spirit of the Juvenile Court and in the light of the objectives of the legislation which enacted Courts Act 1947 (see *Sia Yik Hung v. PP* [1997] 4 CLJ (Supp) 503). Consequently, the Order of the Juvenile Court should not have been included in the list of the 'previous conviction' and the learned Sessions Court judge ought to have disregarded the said Order of the Juvenile Court as it is not a 'previous conviction' in assessing the appropriate sentence.

This court is unable to say whether if the learned Sessions Court judge had properly directed herself and disregarded the said Order of the Juvenile Court as a previous conviction, she would have inevitably imposed the same sentence. It cannot be disputed that what should be the appropriate sentence to be imposed for a particular offence where an accused is found guilty and convicted is within the discretion of the court. However, a sentence which is passed not in accordance with the law cannot be said to be a proper sentence and passed in the exercise of judicial discretion. In the instant appeal, the learned Sessions Court judge had clearly erred when she took into consideration the said Order of the Juvenile Court under s. 12(1)(f) of the Juvenile Courts Act 1947 as a previous conviction and thereby erred in not applying the correct sentencing principles in the assessment of the sentence.

It would also appear that when the accused was sentenced to six months imprisonment on 29 June 1986 for a drug related offence ie, after the Order of the Juvenile Court on 24 January 1983, the learned magistrate in that case must have also been informed undoubtedly of the said Order of the Juvenile Court as if it was a previous conviction' and the learned magistrate no doubt must have taken into account the said Order as a 'previous conviction' when imposing the sentence of six months imprisonment. If this had happened at the magistrate's court on 29 October 1986, it was certainly a grave injustice to the accused because the learned magistrate must have been misled to accept and take into consideration the said Order of the Juvenile Court as a previous conviction because the said Order of the Juvenile Court was not a conviction.

This court wishes to stress and with respect that judicial officers in the lower courts must take great pains, time and make every effort to go through the list of the 'previous convictions' when it is tendered to the court by the prosecution to ensure that the 'previous convictions' or the particulars which are not registrable under the law are not included in the list and the court should disregard those particulars which are included as 'previous convictions' so that such miscarriage of justice as in the instant appeal and clear violation of the sentencing principle will not occur again in the lower courts. It is no excuse for a magistrate or a Sessions Court judge to say that he or she is not aware that the said Order imposed by the Juvenile Court is not a registrable offence or a conviction under the law as they are expected to know the law and should make every effort to read the Law Reports which are currently published on a weekly basis as frequently as possible to keep abreast and update themselves. (See *Sures Perumal v. PP* [2001] 2 CLJ 88 and *Habeeb Najar Abdul Rashid lwn. Penguasa Komandan, Pusat Serenti Bukit Mertajam vide* High Court, Pulau Pinang Criminal Application No: 44-12-69 (unreported).

Having observed the principles of sentencing and after having applied those principles in the instant appeal, this court is of course mindful of the functions and the limited powers of an appellate court to interfere with the exercise of a discretion by the lower courts where the appeal is against sentence. It is therefore worth spelling out some of the related cases which had formulated or reformulated the limited powers of the appellate court in interfering with the sentence passed by the lower courts. In *Rex v. Teo Cheng Lian Rex v. Leck Kwee Ser* [1949] 15 MLJ 170, His Lordship Gordon-Smith J said:

> There must be a manifest error, either in law or in considering the facts and circumstances of the case or an omission to consider such facts and circumstances, before the higher Court interferes with the discretion undoubtedly vested in the lower Court (see *Gumbs Case* 19 Cr App R 74).

In *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 257, His Lordship Hashim Yeop A Sani J (as His Lordship then was) said:

> The principles to be applied in imposing sentence however are the same in every case. The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.

In *Leong Ka Kong v. PP* [1976] 2 MLJ 21 at 22, His Lordship Abdul Hamid J (as he then was) said:

> Insofar as this court is concerned, in exercise of its appellate jurisdiction, it shall consider whether the sentences of the court below were wrong in law or were they manifestly excessive on the facts and circumstances justifying interference. It is settled law that sentences should not be interfered with by the appellate court merely because the individual presiding in the higher court might, having personal view on the matter, have passed a different sentence.
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> Our system, as practised today, has vested the magistrates and presidents with wide discretionary power in the matter of the amount of punishment. Such discretionary power must not, however, be exercised in complete disregard of the facts and circumstances of the case. In point of fact, the discretion must be exercised judicially. Now, in consideration of what I have said, the court should not therefore interfere with the lower court's discretion unless there is apparent on the fact of the record a manifest error either in law, or, in considering the facts and circumstances of the case.

In *Abu Bakar Alif v. R* [1953] 19 MLJ 19, His Lordship Spenser Wilkinson J following the principle enunciated in *R v. Ball* 35 Cr App R 164 said:

> It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene.

In *PP v. Mohamed Nor & Ors* [1985] 2 MLJ 200 at 202, His Lordship Abdul Hamid CJ (Malaya) (as he then was) observed:

> ... we could observe that it is the established principle that an appellate court should be slow to interfere or disturbed with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being

> unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.

Be that as it may, this court is of the view that in the instant appeal there had been a miscarriage of justice when the learned Sessions Court judge took into consideration the Order of the Juvenile Court in arriving at the assessment of the sentence. It has been said time and time again by our Superior Courts that the paramount function and duty of the courts is to see that justice is done in all cases and if the lower court was wrong in law, then surely, it is the duty of the appellate court "to put right that which has gone wrong" in accordance with settled principles of law. By rectifying or correcting the mistake or decision of the lower court, judicial officers should not take this interference as a personal criticism of their conduct as after all the function of the appellate court is to examine the record of appeal with the view to ensure that there is no irregularity or miscarriage of justice and that the extent of the sentence passed by the lower court is in accordance with the right principles of law after having appraised all the material and admissible facts and to disregard all inadmissible facts. It is because of the reservoir of discretion given to the courts on sentencing that there must be some sense of judicial responsibility and seriousness to be undertaken by the lower courts.

Basically, the duty of this court in an appellate capacity is to see that the criminal law is properly administered by the lower courts. Following this duty, it is the function of this court to correct any miscarriage of justice if as in the instant appeal the correctness and propriety of the sentence passed by the Sessions Court judge is questionable and the discretion vested in the lower courts has not been exercised judicially. It is also the view of this court that an exercise of discretion by the lower court in arriving at a proper assessment of sentence to state once again requires a considerable sense of responsibility and the lower courts should refrain from carrying out a mechanical exercise without regard to established judicial principles which this court has often observed in the course of hearing appeals from the lower courts.

If a magistrate or a Sessions Court judge is unsure whether a certain 'previous conviction' should be taken into consideration as included in the list of 'previous convictions', or should be excluded, he or she should call for the relevant statute, in this instant appeal, the Juvenile Courts Act 1947 and the Registration of Criminals And Undesirable Persons Act 1969 and they should not shirk their duty to point out the defects to the prosecuting officer who is usually a police

officer and not qualified in law and if the need so arises they should adjourn the case to check the law and request for an amended copy of the said list.

Time Gap Of Previous Conviction

As to the gap between the previous conviction of the accused on 29 November 1986 for a drug related offence, being in possession of ganja, an offence under s. 6 of the Dangerous Drugs Act 1952 and the present conviction which is also for a similar offence under s. 6 of the Dangerous Drugs Act 1952 which the accused had committed on 17 March 2001, this court is of the view that the learned Sessions Court judge ought to have considered the gap of 16 years in favour of the accused in arriving at a proper assessment of the sentence. Instead she took this 'previous conviction' of the accused on 29 November 1986 as an aggravating factor against the accused to justify imposing a deterrent sentence where she said "Walaupun OKT pernah menjalani hukuman penjara sebelum ini, namun beliau tidak berasa insaf dan kesal serta bertaubat. Beliau tidak mahu mengubah corak kehidupan yang lebih bermakna walaupun telah mempunyai keluarga." This is a clear case where the learned Sessions Court judge did not consider the gap principle in favour of the accused in assessing the sentence to be imposed.

In *Zaidon Shariff v. PP* [1996] 4 CLJ 441, His Lordship Augustine Paul JC (as he then was) said:

> *... the fact that there has been a ten year gap in the appellant's criminal record has not been duly appreciated by the learned Magistrate. The appellant's clean record since his last conviction in 1986 ought to have operated as a mitigating rather than as an aggravating factor*. The rational of the gap principle is that the offender has made an effort to rehabilitate himself and it should accordingly, operate in his favour. (emphasis added)

This principle was followed in *Soosainathan v. PP* [2001] 6 CLJ 44 wherein His Lordship Augustine Paul J said:

> ... the determinative factor in treating a person with previous convictions as a man of previous good character is not so much the time that has lapsed since the last conviction but the positive steps that he has taken to rehabilitate himself. This is in line with the underlying principle in the assessment of the appropriate sentence which is to strike a balance between public interest and the interest of the accused.

In the circumstances, this court is of the view that there should be a balancing exercise between the aggravating and mitigating factors to justify either an increase or reduction in the sentence after considering the seriousness of the

present offence and the gap principle. It is important to observe that there should not be any exaggerated weight attached to the previous conviction without giving due consideration to the gap principle.

In addition to the above two fallacies, this court also found that the learned Sessions Court judge had taken into consideration another factor which is gravely prejudicial and grossly wrong when applying as a strong ground for imposing the ten years' imprisonment where she has stated in her grounds of judgment that the accused was planning to buy a house from the proceeds derived from the sale of the drugs. She said "OKT melakukan kesalahan kerana bertujuan untuk menjual dadah dan hasil daripada itu berniat untuk membeli rumah." This court is unable to find in the record of appeal any such evidence or notes recorded in the notes of proceeding to support this finding or the source from where the learned Sessions Court judge had obtained this information that "hasil daripada itu berniat untuk membeli rumah. " According to the notes of proceedings recorded by the learned Sessions Court judge under "Rayuan OKT" it states "untuk jual dan dapatkan wang untuk lain orang". The accused did not say that he intended to buy a house as found by the learned Sessions Court judge. The learned deputy public prosecutor was also puzzled and said "Saya tak tahu dari mana Hakim Mahkamah Sesyen dapat perkara ini dan saya tidak dapati maklumat ini daripada rekod rayuan." This is a very serious accusation framed against the accused by the Sessions Court judge in the course of her judicial function to justify the heavy sentence. The learned Sessions Court judge ought to have been more careful and cautiousin not allowing herself to be swayed into taking into account unauthorised, irrelevant, extraneous and gravely prejudicial matters which were not even before the Court in assessing the appropriate sentence and which no doubt has turned the scales against the accused and in consequence has caused grave injustice to the accused and to the administration of justice itself.

It cannot be gainsaid that dangerous drugs related offences are very serious and becoming rampant and that the court must show its abhorrence of it and this could only be done by imposing a deterrence sentence against an accused person so as to deter other would be offenders. Also, sentences passed by the court no doubt must commensurate with the seriousness of the criminal conduct and persistent criminality should result in more severe punishment than would otherwise have been imposed (see *R v. Davies* [1978] 67 Cr App R 207 and *PP v. Wong Chak Heng* [1985] 1 MLJ 457). Nevertheless, the learned Sessions Court judge with respect cannot invent theories or speculate or act on fanciful conjecture as in the instant appeal on what the accused would do if he had continued to indulge himself in this drug related offence but the court must only act in the light of clear admissible evidence and not on speculation. The

discretion vested in the lower court to decide on the sentence must also in the view of this court be discharged according to established principles of assessing sentence. In the instant appeal, the accused was charged for possession of the dangerous drugs and not for trafficking or sale of the dangerous drugs and neither does the facts of the case, exh. P1 state anything about the sale of drugs. This court wishes to further observe that the discretion given to a court must be exercised according to the "rules of reason and justice, not according to private opinion" or judicial whims (see *Words And Phrases Legally Defined* (vol 2) 3rd edn) for definition of 'discretion'. As in the instant appeal, if there is a clear breach of criminal law and the discretion given to the lower court to determine the appropriate sentence is not exercised judicially or the lower court had erred in principle, this court sitting in an appellate capacity will readily intervene and correct the error (see *Re Vir Singh* [1998] (SSLR) Supp 6, *Rex v. Leo De Cruz* [1935] MLJ 1, *Lee Yew Siong v. PP* [1973] 1 MLJ 37, *PP v. Khairuddin* [1982] 1 MLJ 331.)

In *Hari Ram Seghal v. PP* [1981] 1 MLJ 165, His Lordship Wan Yahya J (as he then was) said:

> The court must resist the temptation and decline any invitation into playing the romantic role of the avenger and must concentrate itself instead on procuring justice and upholding the rule of law through our recognised machinery of justice. The persons appearing in our courts have the right to expect the best quality of justice and nothing less. Any mistake or flaw in that machinery, which may have the possibility of injustice, must be resolved in their favour.

In the circumstances and taking into account the cumulative effect of the serious misdirections in law by the learned Sessions Court judge and the several unsatisfactory features in the instant appeal and the grave injustice to the accused who is not represented by counsel, it cannot be said that she had exercised her discretion judicially when imposing the sentence of ten years imprisonment. The sentence imposed is unsuitable and wrong in law having regard to the facts and circumstances of this particular case (see *Abdul Rahman Ibrahim v. The Public Prosecutor Of Johore* [1938] 7 MLJ (JR) 219). In *Rex v. Sussex Justices, Ex Parte McCarthy*, Lord Hewart CJ said:

> It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

Accordingly, the appeal by the accused against the sentence is allowed. The sentence of ten years imprisonment which was imposed by the learned Sessions Court judge is reduced to 7 1/2 years with effect from date of his arrest on 17 March 2001 and the ten strokes of the rotan is confirmed.

As to the sum of RM450 which is alleged to have been taken from the accused by the police at the time of his arrest, this court directs that the money be returned to the accused if it is found that it was in actual fact seized from the accused by the police and the deputy public prosecutor is to assist the accused in obtaining the return of the said money.